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IN THE

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska; GINA DUNNING, Director of Regulation and Licensure of the Nebraska Department of Health and Human Services; and CHARLES ANDREWS, M.D., Chief Medical Officer of the State of Nebraska,

Petitioners,

—v.—

LEROY H. CARHART, M.D.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Nebraska partial-birth abortion statute violates women's right to privacy because it bans a broad range of abortion procedures, including the safest method of second-trimester abortion, without regard to fetal viability?

2. Whether the court of appeals properly declined to narrow the scope of the Nebraska partial-birth abortion statute because doing so would have required the court to rewrite the law contrary to legislative intent and because such a narrowing construction would not cure its constitutional deficiencies?

3. Whether Nebraska's partial birth abortion statute violates women's right to privacy even if narrowed to ban only intact dilation and extraction abortions because it: (a) deprives women of their right to bodily integrity by forcing them to undergo undesired and unnecessary medical procedures and preventing some of them from undergoing the safest method of abortion; (b) has the effect of imposing an undue burden on women seeking pre-viability abortions by threatening their health without serving any legitimate state interest; (c) has the impermissible purpose of elevating legal protection of the fetus to the detriment of women's health and liberty; and (d) lacks any exception for women who require abortions to preserve their health, and contains only an inadequate life exception?

4. Whether Nebraska's partial birth abortion statute is void for vagueness because it uses terms such as "substantial portion" that fail to give physicians adequate notice of the prohibited conduct and invite arbitrary and discriminatory enforcement?

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STATEMENT OF THE CASE

A woman's right to terminate her pregnancy is firmly rooted in the Constitution, as this Court recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Moreover, *Roe*'s essential holding that a woman may terminate her pregnancy prior to viability has repeatedly been affirmed by this Court.

The Petitioners ("the State") seek to alter radically these basic tenets. In sweeping language, the Nebraska "partial-birth abortion" ban prohibits most modern abortion techniques without regard to viability of the fetus. *See* Neb. Rev. Stat. §§ 28-326(9), 28-328(1)-(4) ("the Act"). Indeed, the term "partial-birth abortion" was specifically designed to overturn *Roe* by luring this Court away from the viability polestar of its abortion jurisprudence. The Act is part of a coordinated national campaign to expand state interests in pre-viable fetal life at the expense of women's health and liberty.[1] It attempts to eviscerate women's privacy rights by making the location of the fetus in the woman's body -- not

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[1] All available evidence refutes the State's assertion that the public supports the nationwide campaign to ban "partial-birth abortions." In all three states where "partial-birth abortion" bans were submitted for approval in referenda, the bans were rejected by the people. *See* Martin Kasindorf, *No Broad Pattern Evident in Ballot-Initiative Results*, USA TODAY, Nov. 4, 1999, at 4A (Maine); Patrick O'Driscoll, *Voters Had Their Say in 44 States*, USA TODAY, Nov. 5, 1998, at 8A (Colorado and Washington). Fortunately, of course, constitutional rights do not depend on public opinion polls. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (purpose of constitutional rights is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

viability -- the defining criterion for women's pregnancy choices.[2]

Since *Roe*, legal abortion has had an enormous positive effect on women's health in this Nation, both because of the development of increasingly safe abortion techniques and because the abortion choice has been available to women who would otherwise be forced to carry unwanted high-risk pregnancies to term. It has become increasingly difficult, however, for women to obtain abortions. Physicians, like Respondent Carhart, have been forced to work in an exceedingly hostile climate, created not only by private individuals, but also by legislatures that repeatedly enact anti-abortion legislation without regard to women's health or this Court's abortion jurisprudence. *Hope Clinic v. Ryan*, 195 F.3d 857, 879 (7th Cir. 1999) (Posner, C.J., dissenting) *mandate stayed*, No. 99A428 (Stevens, Circuit Justice, Nov. 30, 1999). The record in this case establishes that the Act is a deceptive maneuver in the campaign to erode women's right to choose abortion.

I. THE NEBRASKA BAN

The Act bans "partial-birth abortions." It defines this term to mean "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the child and completing the delivery." Neb. Rev. Stat. § 28-326(9).[3] The Act further

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[2] *See, e.g.*, James Bopp, Jr. and Curtis R. Look, *Partial Birth Abortion: the Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED. 3 (Summer 1998) ("As the [fetus] moves out of the womb it is clothed in personhood by proclamation of the U.S. Supreme Court."). State counsel of record contends that "abortion jurisprudence is limited in applicability to children in utero." Steven Grasz, *If Standing Bear Could Talk . . . Why There is No Constitutional Right to Kill a Partially-Born Human Being*, 33 CREIGHTON L. REV. 23, 26-27 (Dec. 1999).

[3] Although the statute does not define "unborn child," "pregnant" means "that condition of a woman who has unborn human life within her as a result of conception." Neb. Rev. Stat. § 28-326(4). Further, "conception" is defined as "the fecundation of the ovum by the spermatozoa." Neb. Rev. Stat. §28-326(5).

states: "the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." *Id.*

The Act contains no exception for abortions performed to protect a woman's health, nor an exception for when a particular method or variation is the safest for a particular woman.[4] The Act contains only a limited exception for abortions performed to save a woman's life; it permits such procedures only where "necessary" to save her life and then only if the woman's life is threatened by a physical condition. Neb. Rev. Stat. § 28-328(1). By contrast, Nebraska's statute prohibiting post-viability abortions contains exceptions for the woman's life or health with no qualifiers, *see* Neb. Rev. Stat. § 28-329, and permits women requiring such abortions to use the safest method, *see* Neb. Rev. Stat. § 28-330.[5]

The penalty for violating the Act is a maximum prison term of 20 years with up to $25,000 in fines. Neb. Rev. Stat. §§ 28-328(2), 28-105. The Act also provides that a physician's medical license may be revoked for performing a prohibited procedure. Neb. Rev. Stat. § 28-328(4). These

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[4] The legislature failed to pass two amendments that would have permitted women whose health was at risk to undergo a banned procedure. Joint Appendix ("J.A.") 344-47, 405, 415.

[5] In fact, the life exception contained in Nebraska's pre-*Roe* criminal abortion statute did not exclude situations where the woman's life was threatened by a mental condition; and once a woman's life was in danger, physicians, not the legislature, determined the safest medical procedure. Former Neb. Rev. Stat. §§ 28-404, 28-405 (both repealed in 1973).

penalties far exceed those Nebraska applied to illegal abortions prior to *Roe*. Former Neb. Rev. Stat. §§ 28-404, 28-405 (both repealed in 1973) (from one to ten years imprisonment).

II. THE LEGISLATIVE HISTORY OF THE ACT

The Act's legislative history demonstrates that the Nebraska legislature was intent on adopting a broad ban on abortions. It did not aim to ban any specific abortion method; rather, its sponsors "tried to be as encompassing as possible." J.A. 478-79 (Hilgert).

The Act's chief sponsor, Senator Maurstad, acknowledged that it could operate in the first trimester of pregnancy. J.A. 447; *see also* J.A. 458-59 (Senator Bromm agreeing that bill is not a prohibition on late-term abortions). Moreover, Maurstad refused to equate "partial-birth abortion" with the "intact dilation and extraction" method of abortion, as the State now seeks to do in this Court. J.A. 380-83. Although Senator Maurstad repeatedly described his bill in specific terms, *see, e.g.*, J.A. 366 ("People know what 'partial-birth abortion' means. It's when . . . [e]very part of the child is outside the womb of the mother except for its head."), he conceded that the Act's language did not match his description.[6] J.A. 367. Later, however, Senator Maurstad admitted his description "was an accurate *example* of the definition provided in the bill," but "not the *only* example." J.A. 383 (emphasis added) (responding to questions by

[6] The sponsors of partial-birth abortion legislation in Congress also engaged in a similar "bait and switch" in which they described an abortion technique similar to one D&E variant, but then sent a "Dear Colleague" letter to other members of Congress explaining that the federal partial-birth abortion ban "would have the effect of prohibiting *any* abortion in which a child was partially delivered and then killed -- no matter what the abortionist decides to call his particular technique." A-1 (Exh. 31) (emphasis added).

Senator Chambers).[7] In fact, in opposing replacing the term "partial-birth abortion" with the term "intact dilation and extraction," J.A. 381, Senator Maurstad agreed that such an amendment would change "what the bill is designed to do." *Id.* Thus, the Nebraska legislature defeated an amendment that would have substituted the term "intact dilation and extraction" for partial-birth abortion. J.A. 404.

The Act's sponsors also consistently sought to extend legal protection to the fetus once any part of it was brought into the woman's vagina. Initially, the bill did not define the phrase "partially delivers vaginally." J.A. 417. Nevertheless, Senator Maurstad described the term "partially" in his bill as meaning "everything up to completely," or "the opposite of 'completely,'" and stated that "[t]here are many, many definitions of many examples that could fit in to the definition of 'partially'." J.A. 385. *See also* J.A. 367 (Maurstad) ("'partially delivered' . . . could be a foot"), 391 (Maurstad) ("partially delivers vaginally" means "not completely delivered from the vagina").

On the same day that a federal bill banning partial-birth abortion was modified in Congress, Senator Maurstad similarly amended the Nebraska bill to "define" "partially delivers vaginally" to mean "deliberate and intentional delivery into the vagina of a living child or a substantial portion thereof for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." J.A. 416-17.[8]

[7] Contrary to the State's position in this Court, *see* Brief of Petitioners ("Pet. Br.") at 20-21 n.7, Senator Maurstad stated that the Act prohibited not just the breech presentation abortion he had repeatedly described, but also a head first removal of the fetus. J.A. 437. *See also* J.A. 442-43.

[8] Congress amended the federal bill so that it would not extend to "what the doctor was doing when he was delivering the baby for the purpose of a live birth and is not doing an abortion." 143 Cong. Rec. S4671 (daily ed. May 19, 1997) (statement of Sen. Santorum). It did not amend the bill in order to narrow its application to abortion methods. *See Richmond*

This language was not intended to narrow the Act. After stating that the term "substantial" could be "easily defined and would not be something that would be necessarily contestable," J.A. 442, Senator Maurstad then stated: "one-third" of a fetus could be a substantial portion, J.A. 430; "one-fourth" *could* be, depending on "which fourth," J.A. 431; and "substantial would be subjective." *Id.* He also agreed that "as small a portion of the fetus as a foot would constitute a substantial portion," J.A. 452-53, as would a fetal hand. J.A. 453. Senator Maurstad plainly acknowledged that dismembering the fetus after "more than a little bit" of it had been delivered into the vagina would violate the Act. J.A. 442-43.

Other Senators were also confused by the term "substantial portion," although that did not deter their support for the Act. Senator Brashear believed that "substantial portion" connoted both "the portion of the body and . . . the function of that portion of the body," but he agreed that his gloss on the term was not in the bill. J.A. 443-44. He stated, "There's no question there will be a fact question as to what is a substantial portion." *Id.* at 444. Senator Abboud said: "I would assume . . . 'substantial' would mean a significant portion of that child"; he was unable to define the term further. J.A. 449. Senator Bromm, when asked if a physician reading the bill would understand what was meant by the words "or a substantial portion thereof," responded: "I think it would be difficult. . . . *I think their inclination would be simply not to take the risk.*" J.A. 456 (emphasis added). Senator Hilgert opined that the definition of "substantial portion" was "probably a litigable issue," and went so far as to state that if "several experts" on the state medical board "came up with very disparate conclusions upon what the

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Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441, 448 (E.D. Va. 1999) (discussing Santorum amendment), *stayed pending appeal without opinion*, No. 99-2000 (4th Cir. Sept. 14, 1999)

definitions [in the Act] referred to, . . . *that would, itself define ambiguity*." J.A. 475 (emphasis added).

III. STATEMENT OF FACTS

A. The Increasing Medical Safety of Abortion.

The nationwide legalization of abortion following *Roe* has resulted in dramatic health advances for women, and, as a consequence, there have been substantial decreases in the total number of abortion-related deaths and complications. Between 1973 -- the year *Roe* was decided -- and 1985, the death rate for abortion fell more than eight times, from 3.3 deaths per 100,000 in 1973 to 0.4 deaths per 100,000 in 1985. Council on Scientific Affairs, American Medical Association, *Induced Termination of Pregnancy Before and After Roe v. Wade*, 268 JAMA 3231, 3232 (1992). Similarly, abortion-related complications requiring hospitalization fell sharply during the 1970s, with the steepest drop following *Roe* in 1973. *Id.* at 3235.

Although medical advances have made abortions significantly safer for women, the unavailability of abortion providers is a continuing problem for women. In Nebraska, no hospital routinely performs abortions, S.A. 48-49;[9] J.A. 70 (Carhart), and, in 1996, there were only 8 physicians performing abortions in the entire state, down from 27 in 1979. J.A. 508, 527. Dr. Carhart is the only doctor in Nebraska who performs abortions after 16 weeks, S.A. 6, and his patients come from hundreds of miles away, J.A. 79 (Carhart).[10]

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[9] Citations to the Supplemental Appendix to the petition for certiorari, which reprints the district court's opinions, are given as "S.A."; citations to the appendix to the petition, which reprints the opinion of the court of appeals, are given as "_a"; and citations to the appendix to the brief in opposition to certiorari are given as "A-_".

[10] For example, one of Dr. Carhart's patients had been hospitalized with hyperemesis when she was 18 weeks pregnant. She had to be discharged

B. Abortion Methods.

Although the Act's prohibitions apply from the onset of pregnancy and without regard to viability, this case involves only the Act's application to the pre-viability abortions performed by Dr. Carhart. 7a; S.A. 5.

Abortion methods have evolved and changed since *Roe*. In 1975, saline instillation procedures accounted for 68-80% of all second trimester abortions. *Planned Parenthood v. Danforth*, 428 U.S. 52, 77 (1976). By 1983, however, this Court recognized that, due "principal[ly]" to the "wide[] and successful[] use" of the dilation and evacuation (D&E) procedure, in place of instillation techniques, "the safety of second-trimester abortions ha[d] increased dramatically," *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 435-36 (1983) (footnote omitted), to the point where the Court held that D&E procedures "may be performed safely on an outpatient basis in appropriate nonhospital facilities." *Id.* at 436.

Abortions today are performed by a number of methods. The specific method used depends on a variety of factors, including the stage of gestation, the individual woman's medical situation, and the training and skill of the physician. Abortion procedures can be placed in three general categories -- suction curettage, dilation and evacuation, and induction -- although physicians use variations and combinations of these procedures. *See Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794, 797 (8th Cir. 1999).

1. Suction Curettage

Suction curettage is by far the most common abortion procedure used in the United States, J.A. 488 (AMA); S.A. 7, as well as in Nebraska. J.A. 507. It is used up to about 15

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from the hospital and drive ten hours to Omaha in order to have a medically necessary abortion. She then had to drive ten hours back in order to be re-admitted to the hospital for continued treatment. *Id.*

weeks as measured from the first day of the woman's last menstrual period (lmp). J.A. 32 (Carhart), 262 (Stubblefield). In a suction curettage procedure, the physician dilates the woman's cervix using metal rods or osmotic dilators, inserts a tube (cannula) through the woman's vagina and into her uterus, and suctions the embryo or fetus and other products of conception through the woman's vagina and out of her body. J.A. 489 (AMA); S.A. 7-8. The physician sometimes also removes part or all of the fetus with forceps rather than suction. S.A. 8; J.A. 40 (Carhart); J.A. 262 (Stubblefield). After a portion of the fetus has been removed, other parts of the fetus remaining in the uterus will sometimes be alive. J.A. 258 (Stubblefield). The district court found that sometimes the embryo or fetus is brought into the vagina while it is still "living" and intact. S.A. 9, 28. Physicians know that suctioning a pre-viable fetus or embryo out of the woman's uterus will inevitably kill it. J.A. 99 (Carhart).

2. Dilation & Evacuation

Dilation and evacuation ("D&E") is the most common method of pre-viability second-trimester abortion, accounting for approximately 96% of all second-trimester abortions in the United States. J.A. 533 (CDC Table); S.A. 9.

The exact manner in which a physician performs a D&E varies depending on an individual woman's needs and on a physician's own preferences, as informed by his or her experience, skills and judgments about the woman's health. S.A. 6. A physician performing a pre-viability D&E procedure typically dilates the woman's cervix with osmotic dilators, and then removes the products of conception, including the pre-viable fetus, from her uterus using a combination of suction and forceps. J.A. 490 (AMA). In doing so, the physician typically inserts small forceps into the woman's uterus, grasps part of the fetus, and then pulls the pre-viable, living fetus into the vagina and then out of the

woman's body. J.A. 149 (Hodgson), 266-68 (Stubblefield). This process of delivering the fetus into the woman's vagina usually, but not necessarily, involves dismemberment of the fetus. J.A. 54-55, 61-62 (Carhart), 490 (AMA). Both courts below found that dismemberment of the pre-viable fetus does not occur in the woman's uterus. 9a; S.A. 12-13. The district court found that dismemberment occurs as a result of the traction caused by the removal of the fetus through the woman's cervical os into her vagina. S.A. 12. Once a portion of the fetus is removed out of the woman's body, the physician will reinsert the forceps into her uterus and repeat the procedure until all of the products of conception have been removed. J.A. 63 (Carhart), 149-50 (Hodgson), 266-67 (Stubblefield). Because one of the main complications in D&E procedures is uterine perforation, physicians always try to minimize the number of times forceps are inserted into the woman's uterus. S.A. 20, 29, 32.

After approximately 16 weeks gestation, the fetal head cannot typically be safely drawn through the woman's cervix unless it is compressed. J.A. 296 (Stubblefield).[11] In order to protect a woman's cervix, the physician either compresses the skull with forceps before pulling it into the vagina or removes the cranial contents. J.A. 48-50 (Carhart), 492 (AMA).

The "D&X" technique is a variant of D&E that has been developed to reduce risks to some women. S.A. 14.[12] In this D&E variation, the physician tries to remove the fetus intact

[11] It is not medically appropriate to dilate the woman's cervix to a greater extent than necessary to allow passage of the uncompressed head because doing so increases the risks of infection and bleeding. J.A. 297 (Stubblefield).

[12] Both the AMA and Dr. Stubblefield agree that the intact D&E or D&X method is a variation of the D&E procedure because it uses the same instruments and the same processes. J.A. 274 (Stubblefield), 492 (AMA Report refers to "a form of D&E that has been referred to in the popular press as intact dilation and extraction ('D&X')").

and collapses the fetal skull by suctioning the contents, rather than by collapsing it with forceps. S.A. 33; J.A. 492 (AMA). The D&X technique is the safest abortion for some women. S.A. 62-63; J.A. 492. Specifically, the district court found that Dr. Carhart's use of the D&X procedure is "appreciably safer than the D&E procedure" because:

> (a) it reduces instrumentation in the uterus that can cause damage to the uterus and cervix; (b) it reduces uterine or cervical perforation from bony fragments; (c) it prevents disseminated intravascular coagulopathy (DIC) and amniotic fluid embolus (among the most common causes of maternal mortality and complications); (d) it reduces the likelihood of retained fetal parts (a "horrible complication"); (e) it reduces the risk of "free floating head," an uncommon but significant complication; (f) because the D&X is less time consuming than dismembering the fetus, the woman has less operative time, which means less risk of hemorrhage, less total bleeding and less risk of infection when the procedure is used.

S.A. 62-63.[13] *See also* J.A. 492 (AMA), 600-01 (ACOG).

[13] The district court's findings are amply supported by the trial record. For example, the evidence adduced at trial demonstrates that D&X involves fewer insertions of instruments into the woman's uterus and therefore poses less risk of uterine perforation than other forms of the D&E procedure. J.A. 69, 121-22 (Carhart), 268, 275-79 (Stubblefield). Furthermore, because the physician removes the fetus intact in a D&X, the variant poses less risk of retained fetal tissue and uterine perforation by fetal bones than does a dismemberment-type D&E. J.A. 47-48 (Carhart), 268-69, 276, 297 (Stubblefield). The evidence also demonstrates that D&X poses less risks of certain rare complications, such as blood clotting abnormality and amniotic fluid embolism, than do other D&E procedures. J.A. 48 (Carhart), 269, 295 (Stubblefield).

The American College of Obstetricians and Gynecologists ("ACOG"), the American Medical Association ("AMA"), and Dr. Phillip Stubblefield[14] agree that the D&X technique may be the best or most appropriate procedure to use in some situations. J.A. 284 (Stubblefield), 492 (AMA), 601 (ACOG). Based on a report summarizing the performance of approximately 2,700 D&Xs, Dr. Stubblefield believes that the D&X method has "a very impressive record." J.A. 276. While there are no formal medical studies comparing the safety of D&X to other abortion procedures, according to Dr. Stubblefield, "when one has discovered a way of doing something that is so much easier than what you're already doing, [then] it's kind of questionable whether you really need to go to that extent [*i.e.*, conducting studies]." J.A. 311.[15] Dr. Stubblefield further testified that advances in surgical procedures can become medically accepted prior to formal testing and medical proof of the procedure's benefits. J.A. 311-12. Accordingly, Dr. Stubblefield plans to use and teach the D&X method himself and has added the method to a chapter of a textbook he revises. J.A. 279, 307, 314.

Notwithstanding the lack of formal studies, the AMA refers to D&X, along with D&E, labor induction, hysterotomy and hysterectomy, as among "several alternatives that can be used to induce abortion" from the 16th to the 20th week of gestation. J.A. 491. Similarly,

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[14] Dr. Stubblefield, a physician who has been performing abortions since 1973, is a professor and chairman of the Department of Obstetrics and Gynecology at Boston University School of Medicine, and Director of Obstetrics and Gynecology at the Boston Medical Center.

[15] Given the violence that face doctors, it is not surprising that there have been no published studies regarding the comparative safety of D&X. In one case, due to fear of reprisals, a highly respected obstetrician-gynecologist who performs D&X was permitted to testify from behind a screen as a "John Doe" expert. *See Evans v. Kelley*, 977 F. Supp. 1283, 1287 n.4 (E.D. Mich. 1997).

ACOG, which has drafted a definition of D&X, recognizes that D&X is "one method of terminating a pregnancy [after 16 weeks]." J.A. 600. The State's expert concedes that studies are not a necessary prerequisite for the successful development of safer medical procedures. *See* J.A. 669, 675-76 (Boehm) (testifying he had switched from using saline to prostaglandin abortion without any medical studies); *see also* J.A. 530 (Nebraska abortion reporting form allows physician to report the procedure used as, *inter alia*, D&X).

3. Induction

Induction is the only other commonly used second-trimester abortion procedure, accounting for approximately 4% of such abortions nationwide. J.A. 484, 488 (AMA). If induction abortions have been performed in Nebraska at all in recent years, they amount to fewer than 1% of all abortions. J.A. 507 (Table 5). The induction procedure is essentially a pre-term induced labor in which the woman has contractions and eventually, after 15 or more hours, expels the pre-viable fetus. J.A. 272-73 (Stubblefield), 696 (Boehm).

Inductions are usually performed in hospitals, cannot be performed prior to 16 weeks lmp, and are medically contraindicated for women with certain medical conditions such as hypertension, heart disease, or diabetes. J.A. 24-25 (Henshaw), 70-71 (Carhart), 143 (Hodgson), 274 (Stubblefield), 492-93 (AMA). Some inductions may end up as D&E procedures, including the D&X variant. J.A. 71 (Carhart). Up to at least 21 weeks gestation, D&E is statistically safer than induction. J.A. 495 (AMA).[16]

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[16] Two older forms of abortion are hysterotomy and hysterectomy, which are rarely used today. Hysterotomy is a pre-term caesarian section. Hysterectomy is the removal of the uterus. Both are significantly riskier in terms of a woman's mortality and morbidity than other abortion procedures, including D&E and its variations, and are not acceptable abortion procedures. J.A. 281-82, 291 (Stubblefield), 493-494 (AMA).

C. Respondent's Practice.

Respondent Carhart is a retired Air Force Lieutenant Colonel who was on active duty for 21 years. S.A. 2. He has been a doctor since 1973 and has practiced in Nebraska since 1978, when he was assigned to the Offutt Air Force Base in Omaha. S.A. 2-3, J.A. 29-30 (Carhart). He served as Chairman of the surgery department at the base, supervising over twenty doctors, including obstetricians and gynecologists. S.A. 2-3.

Dr. Carhart performs abortions from 3 weeks lmp to viability. S.A. 5; J.A. 31, 76. Because no hospitals openly provide abortions in Nebraska, S.A. 48-49, and because he is the only physician in the state who performs abortions past 16 weeks lmp, Dr. Carhart's patients include women whose lives and health are at risk or whose fetuses have severe anomalies. S.A. 6; J.A. 76, 78-79 (Carhart). For example, his patients include women with severe renal failure, severe brittle diabetes, and women whose lives are in jeopardy and are referred to him by the University of Nebraska. S.A. 6; J.A. 78 (Carhart).

In treating his patients, Dr. Carhart chooses the most appropriate abortion method based on contemporary medical standards and evolving safety criteria. S.A. 6; J.A. 32. In all abortions after 15 weeks, Dr. Carhart attempts to perform a D&X because it poses less risk of both mortality and morbidity than other D&E procedures. S.A. 15; J.A. 46-48, 54, 61.[17]

Because both involve abdominal removal, rather than vaginal delivery, of the fetus, neither of these riskier methods is affected by the Act.

[17] The district court found that, in 1996, Dr. Carhart performed 800 abortions, 200 of which were performed at 14 weeks gestation or greater. S.A. 5-6. Dr. Carhart is able to remove an intact fetus from a woman's body in five to ten percent of the abortions in which he attempts it. J.A. 61.

To perform a D&E up to 20 weeks, Dr. Carhart uses suction or forceps to rupture the membranes. J.A. 46. Then, using forceps, Dr. Carhart attempts to draw the pre-viable fetus into the woman's vagina until the fetal skull lodges in the uterine side of the cervical os. J.A. 56-58. The fetus is typically and technically alive at this point since Dr. Carhart has not taken any step to ensure fetal demise. S.A. 13-14; J.A. 57.[18] Dr. Carhart uses ultrasound during all D&E procedures to minimize the possibility of any unnecessary trauma to the woman; thus, he is able to observe the pre-viable fetus and its heartbeat during the procedure. S.A. 11; J.A. 44, 46. Because he only performs pre-viability abortions, Dr. Carhart knows that every abortion he performs will cause fetal demise. J.A. 99.

Dr. Carhart is not always able to remove an intact fetus because, frequently, after the membranes are ruptured, a fetal extremity spontaneously protrudes into the woman's vagina. S.A. 11.[19] When this happens, Dr. Carhart grasps the extremity and pulls the fetus through the cervical os. S.A. 11. Even when a limb does not spontaneously protrude, the pre-viable fetus sometimes becomes dismembered by the traction of the fetus against the woman's cervical os while Dr. Carhart is drawing it into her vaginal canal. S.A. 12. Thus, when dismemberment occurs, it does so while the fetus

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[18] After 20 weeks, Dr. Carhart ensures fetal demise by injecting digoxin and lidocaine into the pre-viable fetus. J.A. 64. Such injections are riskier in the earlier stages of pregnancy due to the smaller size of the fetus. For example, as the district court recognized, an injection at an earlier stage of pregnancy could penetrate the woman's bowel or deliver the substance into the woman's circulation, yet it has no maternal health benefits. S.A. 18-19; J.A. 66-67, 129, J.A. 291-293 (Stubblefield). For some women, an injection is medically contraindicated. S.A. 19; J.A. 66-67, 113.

[19] While Dr. Carhart does not always successfully perform the D&X procedure (J.A. 61), this does not relieve him of liability under the Act, because attempting to commit a criminal act is a crime even if the crime is not successfully completed. *See* Neb. Rev. Stat. § 28-201.

is partially in the woman's vagina. S.A. 12-13; *see also* 9a-10a. Dismemberment of the fetus causes fetal demise. J.A. 62-64 (Carhart).

Because the skull is too large to pass safely through the woman's cervical os, Dr. Carhart either compresses the head of the pre-viable fetus with forceps or perforates the skull and uses a suction cannula to remove its contents. S.A. 17.[20] Like dismemberment, removing the contents of the skull also eventually causes fetal demise. S.A. 17 (district court noting that while brain death occurs "sometime" during cranial reduction process, fetal heart function "may continue for several seconds or minutes after the fetus's skull is decompressed."); J.A. 58-59. If the fetus presents itself head first, Dr. Carhart performs the procedure in reverse order by first decompressing the fetal skull while the body of the fetus is in the uterus. J.A. 48-49.

D. The State's Evidence.

The State produced no expert testimony that D&X is not safe; nor did the State produce any evidence that D&X is not an "abortion" procedure. In fact, the only State witness found credible by the district court, Dr. Boehm, supports the Act based on his understanding that it bans only the D&X technique, and then solely for political and personal reasons -- not because the D&X technique is unsafe. J.A. 635-36, 672-73. In fact, he conceded that D&X could well be safer than other D&E variants. S.A. 42. He also admitted that he was not as much of an expert on advances in the D&E procedure, since he has not performed such procedures in the past 10 to 15 years, J.A. 627, 654, 709, and that his idea that "partial-birth abortion" is the equivalent of D&X was gained from "the press," a source he would not ordinarily rely upon for formation of his medical opinions. J.A. 663-664.

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[20] Dr. Carhart testified that he dilates a woman's cervix enough to do the procedure, but no more than needed in order safely to remove the products of conception. J.A. 49 (Carhart).

Moreover, Dr. Boehm testified that without the "substantial portion" language, the Act would prohibit most D&E procedures. J.A. 711. Though he testified that the phrase "substantial portion" means "a significant portion of the fetus," he admitted this "definition" was only his "own personal view and not necessarily the view of someone who wants to prosecute this letter of the law." J.A. 709-10. He further admitted that some people may interpret a "substantial portion" to mean a hand or leg and, given that interpretation, the Act proscribes the D&E procedure. J.A. 665-66, 709-10.[21]

IV. HISTORY OF THE PROCEEDINGS

On June 12, 1997, Dr. Carhart filed a complaint challenging the Act's constitutionality in the United States District Court for the District of Nebraska. J.A. 1. On July 2, 1998, the district court issued a preliminary injunction against enforcement of the Act as applied to Dr. Carhart and his patients. J.A. 1. On August 10, 1998, a final judgment was entered against the defendants permanently enjoining them from enforcing the Act against Dr. Carhart, his patients, and others similarly situated. J.A. 2. The district court held that the Act was broad enough to encompass all D&E abortions, and therefore imposed an undue burden; but that, even if it prohibited only certain D&X variants of the D&E, it banned abortion procedures that are the safest for some women and is therefore unconstitutional for this reason as

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[21] The State's other witness, Dr. Riegel, was found "generally not credible" as to abortion practice by the district court. S.A. 45. His wandering testimony about the meaning of the Act and its terms is, however, persuasive evidence of the Act's vagueness. He testified that "substantial portion" is "a vague term," J.A. 232, that it could mean 30% of the fetus, or 50% of the fetus, *id.*, or a "good part" of the fetus, J.A. 232-233, or "half to three-quarters" of the fetus, J.A. 235, and that "it might mean different things to different people." J.A. 234. He acknowledged, however, that he obtained his understanding of the Act's scope from "lay press." J.A. 218.

well. The district court further held that the term "substantial portion," essential to understanding the Act's scope, was void for vagueness. S.A. 86-87. The court of appeals affirmed unanimously, upholding all the district court's finding of facts, but reaching only the holding that the Act prohibits all D&Es and therefore imposes an undue burden. 18a-19a.[22]

SUMMARY OF THE ARGUMENT

Nebraska's ban on "partial-birth abortion" was enacted as part of a deceptive nationwide campaign to eviscerate the key protections guaranteed to American women by *Roe* and *Casey*. Contrary to the way the State characterizes the Act, its prohibitions are limited neither to one medical procedure nor to post-viability abortions. Rather, any reasonable construction of the plain language of the Act, underscored by its legislative history, establishes that the ban is so broad as to prohibit, at a minimum, the D&E method of abortion, the

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[22] Throughout the proceedings, the State has equivocated about whether the Act bans one specific procedure and, if so, whether it bans D&X as defined by ACOG, J.A. 599-600, or "variations" of some unknown number and kind. *See* Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 29. (July 15, 1997) ("[A]ny concerns about LB 23 possibly covering induction abortions are without merit. If a child is delivered alive by induction, an abortionist may not then kill the child even under existing law. If the child is partially delivered (alive) and then deliberately killed, the procedure would not be an induction, but rather a partial birth abortion. *See* LB 23, § 2(9)."); at 45 ("[T]he State of Nebraska, through the legislative process of its elected representatives, has prohibited *any* and *all* methods of killing a living fetus once it has been partially delivered into the vaginal canal regardless of whether the procedure is called 'intact D&E', 'D&X', or 'Sucking the Brains out of a Partially Born Living Baby.'"); at 45 ("The Legislature has prohibited any method of killing of living fetus once it has been partially delivered into the vaginal canal. Use of ACOG or other procedural definitions would allow easy avoidance of the statute since a slight alteration in sequence or procedure would technically not be an 'intact D&E', for example, as described by ACOG.").

most common second-trimester abortion method, as both courts below found. Such a broad ban on a safe and common method of abortion performed pre-viability is unconstitutional under the settled precedents of this Court.

Moreover, the Act is not reasonably susceptible to a construction that would limit it to any one well-defined abortion technique; any such construction would require unconstitutional rewriting of the Act and would conflict with the Act's legislative history. Nor would the State's proposed narrowing of the Act to ban only D&X abortions save it. Such a narrower ban would itself be invalid for three reasons. First, it would deprive women of their right to bodily integrity by forcing them to undergo undesired and unnecessary medical procedures and depriving them of access to the method of abortion that would be the safest in their own individual circumstances. Pregnant women seeking abortions should not be forced to endure such physically intrusive alterations in the medical procedures they are to undergo. These are intrusions no other group of persons would ever be expected to endure. Second, the narrower ban would have the effect of imposing an undue burden on women seeking pre-viability abortions because it would harm women's health without serving any legitimate state interest. In addition, it would have the impermissible purpose of according legal protection to the pre-viable fetus based on its location in the woman's body and at the expense of women's health and liberty. Third, it would be unconstitutional because it lacks any exception for women who require abortions to preserve their health, and contains only a grossly inadequate life exception.

Finally, the Act is void for vagueness. By using vague terms such as "substantial portion," the Act fails to give physicians notice of the conduct it prohibits and is an open invitation to arbitrary and discriminatory enforcement. Thus, it will chill the performance of all abortions.

ARGUMENT

I. THE ACT IMPERMISSIBLY PROHIBITS MOST ABORTIONS.

As both the district court and the court of appeals held, the Act prohibits common, safe abortion methods regardless of viability and is therefore unconstitutional. 18a-19a; S.A. 69-70, 74-75, 79. The State agrees that if the Act prohibits D&E abortions it is unconstitutional, so the State now seeks to limit the Act to a subset of D&E procedures it refers to as "D&X," but never defines.[23] But "partial-birth abortion," as defined by the Act and its legislative sponsors, is not the same thing as the D&X technique defined by ACOG and other medical organizations. On the contrary, the Act's definition of "partial-birth abortion" intentionally sweeps far beyond D&X.

Every court to review a partial-birth abortion ban on the merits has concluded that it bans more than D&X (by any definition), including, at a minimum, other forms of D&E. *Planned Parenthood v. Miller*, 195 F.3d 386, 388-89 (8th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3434 (U.S. Jan. 3, 2000) (No. 99-1112); *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794, 797-98 (8th Cir. 1999); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 614-15 (E.D. La. 1999), *appeal argued*, No. 99-30324 (5th Cir. Mar. 2, 2000); *Richmond Med. Ctr. v. Gilmore*, 55 F. Supp. 2d 441, 471 (E.D. Va. 1999), *stayed pending appeal without opinion*, No. 99-2000 (4th Cir. Sept. 14, 1999); *Weyhrich v. Lance*, No. CV98-0117-S-BLW (D. Idaho Oct. 12, 1999); *Rhode Island Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 309 (D.R.I. 1999), *appeal stayed*, No. 99-2095 (1st Cir. Nov. 22, 1999); *Planned Parenthood v. Verniero,* 41 F. Supp. 2d 478, 503-04 (D.N.J. 1998), *appeal argued*, No. 99-5042 (3d

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[23] Earlier in this litigation, the State argued *against* precisely such a limitation. *See supra* n.22

Cir. Nov. 19, 1999); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1035 (W.D. Ky. 1998), *appeal argued*, No. 98-6671 (6th Cir. Dec. 15, 1999); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1155 (S.D. Fla. 1998), *appeal dismissed*, No. 99-4002 (11th Cir. Mar. 2, 1999); *Planned Parenthood v. Woods*, 982 F. Supp. 1369, 1378 (D. Ariz. 1997), *appeal dismissed*, No. 97-17377 (9th Cir. Feb. 26, 1999); *Evans*, 977 F. Supp. at 1317; *Planned Parenthood of Alaska v. Alaska*, No. 3AN-97-6019, slip op. at 17 (Alaska Super. Ct. Mar 13, 1998), *appeal docketed*, No. S-08610 (Alaska Apr. 13, 1998); *Intermountain Planned Parenthood v. Montana*, No. 97-477, slip op. at 12 (Mont. Dist. Ct. June 29, 1998). Even the one court to uphold partial-birth abortion statutes conceded that they can be read to prohibit both D&E and induction procedures and therefore ordered the issuance of "precautionary injunctions" to narrow their scope. *Hope*, 195 F.3d at 863, 869.

A. The Act's Plain Language Prohibits Most Abortions, and its Broad Scope is Confirmed by its Legislative History.

The cardinal principle of statutory construction in Nebraska law is to "give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense." *State ex rel. Stenberg v. Moore*, 602 N.W.2d 465, 472 (Neb. 1999). Where the terms of a statute are open to interpretation, Nebraska law directs courts to look to legislative history. *Id.* at 473. Both the Act's plain language and its legislative history establish that it bans most abortion methods.

As the State has conceded, the crime of partial-birth abortion is composed of three elements: "the intentional 1) partial delivery of a living fetus vaginally, 2) killing the fetus and 3) completing the delivery." Defs.' Post-trial Brief at 93-94. These elements describe conduct that is intentionally

performed in almost all pre-viability abortion methods, including suction curettage, D&E (and its D&X variant), and induction. None of the elements is unique to D&X; instead, the Act's definition of "partial-birth abortion" describes the material elements common to all these methods.

First, in every pre-viability abortion performed by suction curettage, D&E (including its D&X variant), or labor induction, the physician deliberately and intentionally delivers the embryo or the fetus, or parts thereof, into the vagina. S.A. 79. In fact, it is the essence of all non-abdominal abortion methods that the pre-viable "unborn child" is delivered into the woman's vagina in order to be removed from her body. J.A. 289-90 (Stubblefield). Unless the physician takes steps to insure fetal demise before delivering part of the fetus into the vagina,[24] the "unborn child" will ordinarily be "living," even though not viable when the physician draws it into the vagina. J.A. 41-44, 47, 57 (Carhart), 290-91 (Stubblefield). Further, in any of these methods, the physician usually delivers part of the "living unborn child" into the vagina, J.A. 290-91 (Stubblefield), and the legislative history of the Act establishes that *any* part of the fetus constitutes a substantial portion. *See supra* at 6.[25] Additionally, the Act's plain language, confirmed by the legislative history, applies to the delivery of a substantial portion of the fetus regardless of whether that portion is still attached to an intact fetus.[26]

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[24] As set forth above, *see supra* at n.18, the district court found, and the State does not dispute, that prior to 20 weeks gestation inducing fetal demise only imposes increased health risks on the woman without conferring any corresponding benefit. S.A. 18-19.

[25] The State completely disregards this legislative history, *see* Pet. Br. at 21 n.7, arguing circularly that the term is defined by its "context" and means the entire "child up to the head." *Id.* at 20. Notably, this is a meaning of the term expressly rejected by the Act's sponsor. J.A. 367.

[26] Requiring the "substantial portion" to be a portion of an *intact* fetus, as the State suggests, Pet. Br. at 16, would require an improper judicial revision of the Act. *Virginia v. American Booksellers*, 484 U.S. 383, 397 (1988); *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997). Further, in many abortions by suction curettage, D&E and induction, the physician does deliver the living fetus into the vagina while it is intact. S.A. 79; J.A. 42 (Carhart), 258 (Stubblefield).

Second, in every pre-viability suction curettage, induction, or D&E procedure, the physician has the purpose of performing a procedure that the physician knows will kill the fetus. J.A. 290 (Stubblefield). The Act does not require, as the State now urges, that the procedure that kills the fetus be "a separate death-causing procedure." *See* Pet. Br. at 14. Adding such a requirement would entail impermissibly rewriting the Act. *See American Booksellers*, 484 U.S. at 397; *ACLU*, 521 U.S. at 884-85. Even if the Act could be construed to contain such a requirement, however, most D&E and some suction curettage and induction procedures include a "death-causing procedure," be it dismemberment, cutting the umbilical cord, completely removing the fetus from the uterus with suction, or reducing the size of the fetal head so it fits through the cervix.[27]

Third, in each of these procedures, the physician, after having taken steps that he knows will kill the fetus, completes the delivery of the "unborn child." This involves removing remaining products of conception, including the placenta, with suction, forceps, or a combination of both. J.A. 44-45 (Carhart). Thus, the three elements of the crime are met in most abortions.

The Act's legislative history confirms its applicability to most pre-viability abortions. As one supporter stated: "We tried to be *as encompassing as possible*. . . . This bill does

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[27] The Act's sponsor explicitly stated that the Act prohibits D&Es in which the fetus is killed by dismemberment after partial delivery. J.A. 442-43; *see also* S.A. 83. Further, the State concedes that, in an induction: "If the child is partially delivered (alive) and then deliberately killed, the procedure would not be an induction, but rather a partial-birth abortion." Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 29 (July 15, 1997).

encompass more than specific examples [of D&X techniques] that people related and the illustrations presented. . . ." J.A. 478-79 (Sen. Hilgert) (emphasis added). Similarly, Senator Maurstad admitted that the D&X procedure he described "was an accurate *example* of the definition provided in the bill," but "not the *only* example." J.A. 383 (emphasis added) (responding to questions by Senator Chambers). In fact, the Legislature rejected an amendment to narrow the Act to prohibit only "intact dilation & extraction" procedures. J.A. 380, 404. In opposing this amendment, Senator Maurstad stated that the amendment would change "what the bill is designed to do." J.A. 381.

Thus, the Act's plain language and its legislative history demonstrate that the Act operates to ban most pre-viability abortions; certainly, the court below correctly concluded that it bans most D&Es. *See* 18a-19a. A ban on most pre-viability abortions is plainly unconstitutional under *Casey*, as is a ban on the most common method of second-trimester abortions. *Danforth*, 428 U.S. at 78-79. Further, any such ban also violates women's right to privacy for the same reason that a ban on a single abortion technique does. *See* Point II.

B. The Act is Not Reasonably Susceptible to Any Narrowing "Construction."

In an effort to salvage the Act, the State makes several overlapping arguments for limiting the ban to only D&X abortions. This Court can only adopt a narrowing construction of the Act if it is "reasonably susceptible" to that construction. *American Booksellers*, 484 U.S. at 397; *ACLU*, 521 U.S. at 884. Yet each rationale the State proposes for a statutory overhaul is unsupported by the record. Indeed, the proposed revisions contradict both the text of the Act and its legislative history. Moreover, several rationales violate the cardinal principle that, in Justice Frankfurter's words, "A judge must not rewrite a statute, neither to enlarge nor to

contract it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).[28]

First, the State argues that the Act cannot be construed to prohibit D&Es (other than the D&X variant) because the State has never applied or threatened to apply the Act to those abortions. Pet. Br. at 12. But the State's failure to prosecute a D&E or any other abortion procedure during the eight-day period the Act was in effect provides no basis for narrowing the Act, particularly since Dr. Carhart did not provide abortions during that period. J.A. 120 (Carhart). Moreover, Dr. Carhart was under no obligation to wait and see which of his abortions would result in felony charges before challenging the Act. *See Doe v. Bolton*, 410 U.S. 179, 188 (1973). In light of the legislative history of the Act, and the fact that he was targeted by name in the sponsor's legislative file, J.A. 718, he would have been foolish to do so.

Second, the State argues that its "chief law enforcement officer" -- Petitioner Stenberg -- has "interpreted the statute as encompassing only the D&X procedure." Pet. Br. at 12. But the State cites only *arguments* made in the course of *this litigation* for this "interpretation." Such arguments do not amount to interpretation; indeed, if they did, the State could simply cite its own brief as an "interpretation" that is "entitled to deference." *See id.*[29] Moreover, the State's

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[28] For the same reason that the Act cannot be narrowed by judicial rewriting to cover only D&X abortions, the Seventh Circuit's narrowing of similar statutes by precautionary injunctions was a transgression of that court's authority. *See Hope*, 195 F.3d at 886 (Posner, C.J., dissenting) (observing that those injunctions "brushed aside" the limitations on federal court revision of state statutes).

[29] The State also asks this Court to defer to the Nebraska Attorney General's shifting "interpretation" of the Act during this litigation pursuant to a variation of the deference this court gives to federal agency interpretations of federal statutes under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). *See* Pet. Br. at 28. But even

position on the meaning of the Act has shifted considerably during this litigation. *See supra* at n.22. The wide-ranging inconsistencies in the State's assertions about the Act's scope render its latest *ipse dixit* "interpretation" neither credible nor persuasive. Finally, Stenberg's "interpretation" is not binding on either Nebraska state courts or prosecutors. *State v. Coffman*, 330 N.W. 2d 727, 728 (Neb. 1983); *Follmer v. State*, 142 N.W. 908, 910 (Neb. 1913).

Third, under the rubric of examining the Act's plain language, *see* Pet. Br. at 13-21, the State claims that no reasonable person could understand "partial-birth abortion" to mean anything except D&X. This claim is refuted by: (1) the fact that the four "reasonable" federal judges below, as well as numerous other federal and state court judges, all concluded that the Act bans D&Es, *see supra* at 20-21; (2) the fact that the chief legislative sponsor of the Act stated that D&X is only one "example" of the procedures to which the Act applies, *see supra* at 4; (3) the concessions of the State's own witnesses, *see supra* at 17;[30] and (4) the State's previous descriptions of the Act's scope, *see supra* at n.22.

The State next asserts that the Act cannot reasonably be read to apply to "dismemberment" abortions because a fetus

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if *Chevron* deference applies to constructions by state agencies of state law, it is appropriate only where the agency interpretation is consistent with legislative intent. *Chevron*, 467 U.S. at 842-44. Here, no consistency between the Attorney General's latest "interpretation" and the intent of the Nebraska Legislature exists. Further, the Act does not charge the Nebraska Attorney General with "issu[ing] regulations implementing" the Act. *Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 2185 (1999).

[30] Dr. Boehm, described by the State as giving "the only objective and credible expert testimony" in this case, Pet. Br. at 37-38, conceded that, without the "substantial portion" language, the Act bans D&E abortions. J.A. 710-11. He also conceded that others could easily interpret the term "substantial portion" in a manner that would still result in the Act prohibiting the D&E method. J.A. 665-67, 709-11.

must be "intact." But the word intact appears nowhere in the Act;[31] indeed, the chief sponsor of the Act agreed that it could apply to procedures in which the fetus is dismembered after partial delivery. S.A. 83-85; J.A. 442-43. The State also proposes that this Court rewrite the phrase "for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child" to read "for the purpose of performing a *separate* death-causing procedure." Pet. Br. at 14 (emphasis added).[32] This proposed revision presents three problems: it requires the Court to amend the Act; it does not explain how a physician can determine which steps constitute "separate" procedures; it does not exclude D&E abortions because there is no principled distinction in terms of "separateness" between compressing the fetal head and dismembering the fetus.[33] Both cause fetal demise and

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[31] As both courts below found, in most D&E abortions, the fetus is intact when the physician draws it partway into the woman's vagina; only after it is "partially delivered" does dismemberment occur. 9a-10a; S.A. 12-13; J.A. 61-62 (Carhart). Further, nothing in the Act requires the fetus to be "intact" after the procedure is completed.

[32] Similarly, the State asks the Court to rewrite the phrase "and does kill the unborn child" to read "kill[s] the unborn child *by the separate procedure . . .*" *Id.* (emphasis added). Even if the Act were rewritten to require intentional delivery into the vagina for the purpose of performing a "separate death-causing procedure," it still would *not* require that this "separate death-causing procedure" be the action that kills the fetus. *Any* intentional act that "does kill the unborn child" after partial delivery is sufficient under the Act's plain language.

[33] Indeed, that neither dismemberment nor compressing the fetal head is a "separate" procedure is shown by the fact that no physician would ever perform it in isolation. The State claims a difference between dismemberment and compressing the fetal head based on the physician's knowledge of precisely when fetal demise occur. *See* Pet. Br. at 17-18. But the Act does not require such knowledge as an element any more than a homicide statute requires the murderer to know when his victim dies. Further, as the district court recognized, the exact timing of fetal demise is not known even in a D&X procedure. S.A. 17; J.A. 56-60.

are simply steps in the overall abortion procedure.[34] *See* sup*ra* at 16. Further, the State asks this Court to construe the term "substantial portion" to mean "the child up to the head," Pet. Br. at 20, claiming that this meaning is clear from the Act's legislative history. But the extensive discussions in the Nebraska Legislature establish that, whatever the Legislature intended this phrase to mean, it certainly did not intend it to mean "completely up to the head." J.A. 367.

Fourth, the State selectively quotes from the Act's legislative history to support its claim that the Act's "expressly stated [legislative] purpose" is to ban only the D&X procedure. Pet. Br. at 22-23. Any but the most cursory review of the legislative history, however, establishes that the Act's sponsors clearly intended a much broader prohibition. *See supra* at 4-7. They believed the Act applied in the first trimester. J.A. 447, 458-59. They believed the Act applied to procedures involving dismemberment. J.A. 443. They believed the Act was triggered when any part of the living fetus was brought into the vagina. J.A. 454. They sought to be as "encompassing as possible." J.A. 478. And they rejected an amendment that would have limited the ban to D&X abortions. J.A. 380, 404-05. Thus, the legislative history flatly contradicts the suggestion that the Act was intended to reach only D&X procedures.

Finally, the "doctrine of constitutional avoidance" advanced by the State, Pet. Br. at 23, does not authorize a federal court to rewrite a state statute. *American Booksellers*, 484 U.S. at 397. Moreover, resort to this "doctrine" would be futile here because the Act is unconstitutional even if

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[34] The State's contention that the physician does not "know" that dismemberment kills the unborn child, *see* Pet. Br at 18, is simply not credible. A D&E does not involve "random acts of dismemberment," *id.*; it involves intentional dismemberment of the fetus in as few steps as possible by drawing the fetus into the vagina and using the traction of the fetus against the cervical os to detach the part to permit safe removal. S.A. 12-13; J.A. 54-55, 61 (Carhart), 490 (AMA), 266-68 (Stubblefield).

rewritten to ban only some subset of abortions. *See* Points II & III *infra*.

Thus, the Act cannot reasonably be construed to prohibit only D&X. Because the Act bans most safe abortion methods, it is unconstitutional. *Danforth*, 428 U.S. at 78-79.

II. THE ACT, EVEN IF REWRITTEN, VIOLATES WOMEN'S RIGHT TO PRIVACY.

Even if the Act could be rewritten by this Court to ban only a subset of D&E abortions, such a narrower ban would still be unconstitutional because it would prohibit medically accepted abortion techniques that are the safest techniques for some women.[35] Moreover, there is no way to construe the Act to include a health exception or full-fledged life exception, as are required under this Court's precedents. Indeed, the State opposes such exceptions. Pet. Br. at 30-31. Furthermore, the State does not seriously contend that the Act serves its interests in maternal health or potential life -- it only serves "interests," which, if deemed legitimate in this context, would justify complete bans on all abortions.[36] *A fortiori*, the much broader ban imposed by the Act's plain language is also unconstitutional for these same reasons.

A. The Act, Even If Narrowed, Does Not Survive the Scrutiny Applicable to Abortion Restrictions that Intrude on Bodily Integrity.

A law that prevents a woman from obtaining the safe pre-viability abortion procedure of her choice infringes upon her right to privacy. In *Casey*, this Court held that a woman's constitutional right to terminate her pregnancy incorporates

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[35] In addition, the suggested revision of the Act is too vague to pass constitutional muster, for it does not define with adequate precision what the State means by a "D&X" abortion. *See infra* at n.50.

[36] It therefore serves only the invidious purpose of banning and chilling the performance of abortions. *See infra* at **42-46**.

two strands of the right to privacy: the right to decisional autonomy and the right to bodily integrity. *Casey*, 505 U.S. at 849, 857. *See also City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 427 (1983) (physician must be given room to exercise judgment in "both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion"); *Benten v. Kessler*, 505 U.S. 1084, 1085 (1992) (Stevens, J., dissenting) (a woman's "constitutionally protected interest in liberty has two components -- her decision to terminate the pregnancy and her decision concerning the method of doing so.").

Prior to *Casey*, this Court employed strict scrutiny in assessing restrictions on the right to privacy, requiring that such restrictions be narrowly tailored to serve a compelling state interest in order to survive constitutional review. *See, e.g., Akron*, 462 U.S. at 427. Further, the two recognized state interests became compelling at different points in pregnancy: potential life after viability and maternal health after the first trimester. *Roe*, 410 U.S. at 163-64.

Casey expanded the States' authority to regulate abortion by permitting them to enact certain measures that promote the interest in potential life prior to viability.[37] 505 U.S. at 871-73. Specifically, States are permitted to dissuade women from having pre-viability abortions by measures calculated to "inform the woman's free choice, not hinder it," *id.* at 877, so long as these measures do not have the purpose or effect of imposing a substantial obstacle. *Id.* at 877-78. Thus, the *Casey* joint opinion adopted a mid-level "undue burden" standard for assessing restrictions on the woman's *decision* whether or not to carry her pregnancy to term. *Casey* did not, however, alter the constitutional standard of review applicable to statutes that restrict the *means* by which a woman terminates her pregnancy before viability. Such

[37] *Casey*, however, explicitly re-affirmed *Roe*'s standard of review for restrictions on post-viability abortions. 505 U.S. at 879.

statutes affect the woman's bodily integrity and health, but do not implicate the state's interest in potential life. Because no restrictions implicating bodily integrity were before this Court in *Casey*, that aspect of the privacy right continues to be subject to the same stringent protection it was given before *Casey*.[38]

This Court has twice held that statutes prohibiting a woman from using the abortion method of her choice violate her right to privacy. In *Thornburgh v. ACOG*, 476 U.S. 747 (1986), the Court struck down a statute that required women having life- or health-saving post-viability abortions to use the method most likely to result in a live birth unless doing so would "present a significantly greater medical risk to the . . . woman." *Id.* at 768. Because the statute "required a 'trade-off' between the woman's health and fetal survival and failed to require that maternal health be the physician's paramount consideration," *id.* at 768-69, it was unconstitutional. *See id.* at 769. *See also Jane L. v. Bangerter*, 61 F.3d 1493, 1502-05 (10th Cir. 1995) (striking post-viability "choice of method" statute), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996).

Similarly, in *Danforth*, this Court invalidated a ban on saline abortions, a type of induction procedure, which at that time was the most common method of second-trimester abortion. After closely examining whether the statute actually furthered the state's compelling interest in maternal health in the least restrictive manner, the Court concluded that Missouri's saline ban did not promote maternal health, but instead interfered with women's access to safe abortion procedures. *See id.* 428 U.S. at 76-79. It explained, "[t]he State . . . would prohibit the use of a method which the record shows is one of the most commonly used nationally by

[38] If the *Casey* "undue burden" standard does apply to restrictions on choice of abortion method, however, the Act is still invalid both as written and if narrowed to ban only D&X. *See infra* at 35-48.

physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth." *Id.* at 78. Although the Court appropriately recognized that, prior to viability, the state has a compelling interest in preventing the performance of *unsafe* procedures, it found that the state did not further that interest by forcing physicians to use techniques that are many times more likely to result in maternal death. *See id.* at 76, 78-79. Moreover, *Danforth* struck the ban even though methods of abortion *safer* than saline existed. *Id.* at 76-78.

The Act, like the provisions invalidated in *Danforth* and *Thornburgh*, implicates the bodily integrity strand of the right to privacy. The Act does not advance the state's legitimate interest in potential life by seeking to dissuade women from choosing abortion. Rather, it dictates the woman's (and her physician's) options once she has made the decision to end her pregnancy. Therefore, the determinative inquiry is not whether the State has unduly burdened women from making the "ultimate decision" of whether to have an abortion, *Casey*, 505 U.S. at 877, but rather whether the ban serves the state's interest in maternal health. *Danforth*, 428 U.S. at 76.

Far from promoting maternal health, the Act actually harms maternal health without justification. Even under the State's proposed revision, the Act prohibits a subset of D&E procedures, which are, as used by Dr. Carhart, not only safe and within accepted medical practice, but, as the district court found, the safest available procedures for some women. S.A. 62-63, 70-71; J.A. 61, 69, 101, 121-22, 125 (Carhart). In contrast, the Act's failure to "prohibit techniques that are many times more likely to result in maternal death," such as hysterotomy and hysterectomy, demonstrates that it does not serve the state's interest in maternal health. *Danforth*, 428 U.S. at 78.

Further, the Act impermissibly forces women to submit to additional and unnecessary medical procedures -- such as inducing fetal demise in utero, or unnecessary insertion of sharp instruments into the uterus -- as the price for seeking an abortion. S.A. 63; J.A. 69, 121-22 (Carhart), 268, 275-79 (Stubblefield). These medical procedures involve a substantial intrusion upon a woman's bodily integrity, far more than this Court has permitted in contexts where the state's reasons for infringing upon bodily integrity were more apparent. *See Winston v. Lee*, 470 U.S. 753, 766 (1985) (rejecting surgical operation to remove bullet for use as evidence in criminal prosecution); *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (rejecting forcible stomach pumping to obtain evidence of crime). The State cannot force a woman seeking an abortion to undergo these intrusions on her bodily integrity, for it is simply intolerable to require a woman "to forfeit one constitutionally protected right as the price for exercising another." *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977); *Simmons v. United States*, 390 U.S. 377, 394 (1968).

On its face, the Act prevents a woman from choosing, in consultation with her physician, her preferred method of terminating a non-viable pregnancy. Not only will preventing a woman from obtaining a D&X abortion once she has decided to terminate her pregnancy flatly violate her right to make the "decision concerning the method of abortion," *Benten*, 505 U.S. at 1085 (Stevens, J., dissenting), it denies her physician the discretion to use his or her best medical judgment "in determining how [the] abortion [i]s to be carried out." *Colautti v. Franklin*, 439 U.S. 379, 387 (1979).[39] *See also Cruzan v. Director, Missouri Dep't of*

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[39] The role of the physician in making medical judgments related to the abortion has been recognized by this Court in two contexts: determining how to carry out the woman's decision to end her pregnancy, and assessing whether the fetus is viable. Even in the latter context, where the State's "profound" interest in potential life is most strongly present,

Health, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring) ("Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment.").

Lastly, the Act harms maternal health by preventing the development of safer methods of abortion. A ban on a new abortion method or variation on an existing method ties the hands of physicians and risks halting the evolution of methods which has made abortion increasingly safe since 1973. *See supra* at 7-8. This Court has recognized the risk that proscribing methods of abortion poses to women. In *Danforth*, this Court struck down Missouri's ban on the use of "saline or other fluids" in part because this open-ended language would prohibit the use of "other methods that may be developed in the future and that may prove to be highly effective and completely safe." *Danforth*, 428 U.S. at 78. Indeed, this Court was prescient in that other methods were so developed. Likewise, the Act chills physicians' ability to develop newer, safer abortion methods. *See* Brief of ACOG, et al.

Because the Act intrudes on women's bodily integrity and the State cannot meet its burden of establishing that the Act serves the state's interest in maternal health, the Act is invalid on its face. *See Akron*, 462 U.S. at 438 & n.27 (striking second-trimester hospitalization requirement for abortions even though the statute had constitutional applications).

Casey, 505 U.S. at 877, this Court has carefully guarded the role of the physician's judgment. Accordingly, this Court and the lower federal courts have consistently refused to allow legislative judgments about viability to supplant the physician's judgment. *Colautti*, 439 U.S. at 388; *Danforth*, 428 U.S. at 64; *Hodgson v. Lawson*, 542 F.2d 1350, 1354 (8th Cir. 1976). The role of the physician in determining, in consultation with the woman, how to carry out a pre-viability abortion is worthy of at least as much protection.

B. The Act, Even if Narrowed, Imposes an Undue Burden on Women's Right to Seek Pre-Viability Abortions.

The courts below reviewed the Act under the undue burden test of *Casey*. The Act is invalid under this test as well, for two reasons. First, the Act infringes upon a woman's liberty without serving either of the state's legitimate interests, and is therefore a *per se* undue burden. This is particularly true because the Act actually disserves the state's interest in maternal health. Second, the Act's only purpose is the illegitimate one of enhancing legal protection for the fetus at the expense of women's health and liberty.

1. The Act's Effect is to Harm Women's Health Without Serving Any Legitimate Interest.

The Act, as most recently construed by the State, would prohibit Dr. Carhart from performing pre-viability abortions using the D&X procedure. Such a prohibition would force each woman who would otherwise obtain an abortion by a banned method to undergo a riskier form of D&E. *See supra* at 11. Unnecessary increased medical risks impose an undue burden on the woman's right to privacy. *See Hope*, 195 F.3d at 878 (Posner, C.J., dissenting) ("as banning 'partial birth' abortions is not intended to improve the health of women (or anyone, for that matter), it cannot be defended as a health regulation").

This Court has never approved even a *marginal* increase in risk to women's health or a limitation on the woman's choice of method unless such an increase was offset by a demonstrable corresponding benefit.[40] Thus, while

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[40] The State, like the Seventh Circuit in *Hope*, also wrongly inverts the burden of proof in abortion cases. Nebraska must prove that a regulation *furthers* its interest in maternal health; it is not a physician's burden to show that a regulation harms women's health, although this has been shown here. Under "intermediate scrutiny" standards, such as the undue

recognizing that Pennsylvania's mandatory 24-hour delay would marginally increase the risks associated with an abortion, 505 U.S. at 886, *Casey* approved that increased risk because it also benefited women's health by making their decisions more informed. *Id.* at 885. Likewise, although parental involvement laws undoubtedly delay minors in obtaining abortions (thus increasing the medical risks of the procedure), because they help ensure that the minor's decision is well-informed, the increased risk is tolerable. In contrast, the Act imposes an increased risk on women and restricts the exercise of their rights without conferring any corresponding benefit -- its only effect is to render abortions more dangerous and infringe on women's right to privacy. Thus, the Act imposes a *per se* undue burden. *See Planned Parenthood v. Doyle*, 162 F.3d 463, 468-69 (7th Cir. 1998).

Purportedly relying on *Casey*, the State argues that, because banning D&X does not cause a *significant* threat to a woman seeking an abortion, and other safe procedures remain available, it is permissible. Pet. Br. at 34-35. This argument is legally wrong and rests on an erroneous factual assumption.

First, the State is barred from imposing even marginal risks on women's health unless those risks are justified by serving a legitimate interest.[41] As *Casey* holds, "a statute which, *while furthering the interest in potential life or some*

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burden standard, the State must do more than baldly assert that legitimate interests are served. *See, e.g., United States v. Virginia*, 518 U.S. 515, 532 (1996) ("the burden of justification is demanding and it rests entirely on the State. . . . The justification must be genuine, not hypothesized or invented post hoc in response to litigation."). *See also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 624 (1994) (applying intermediate scrutiny and requiring that asserted harms be "real, not merely conjectural").

[41] Thus, the absence of studies proving D&X is safer than other abortion methods proves nothing; to ban D&X, the State must affirmatively demonstrate that banning D&X promotes women's health.

other valid state interest, has the effect of placing a substantial obstacle in the path of the woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877 (emphasis added). Here, there is no evidence that the Act furthers *any* valid state interest. *Casey* upheld a 24-hour waiting period because it furthered the state interests in dissuading some women from having an abortion and rendering their decision more informed. *See id.* at 882-83. Moreover, the Court also found that in the "vast majority of cases, a 24-hour delay does not create any *appreciable* health risk," *id.* at 885 (emphasis added);[42] and the delay was waived if it would, in a particular case, "in any way pose a significant threat to the life or health of a woman." *Id.* at 880. Thus, *Casey* upheld the Pennsylvania law because it served the state's interest in discouraging abortion at the price of a marginal health risk to women; where the health risk rose to the level of a "significant threat," the statute was inapplicable. *Casey* did not address threats to women's health or bodily integrity that serve no legitimate state interest whatsoever.

In contrast to the statute upheld in *Casey*, the Act serves no state interest in dissuading abortion; thus, the health risks and intrusions on bodily integrity it imposes on women are utterly gratuitous. Banning a particular procedure before viability when others remain available serves no interest in potential life and does not inform women's decisions. *See Doyle*, 162 F.3d at 470. Nor does a statute which imposes increased risks on the woman seeking an abortion serve any state interest in maternal health. *Cf. Jane L.*, 61 F.3d at 1502-06.

The remaining purported state interests suggested by the State are either not legitimate under *Casey*, or are not served

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[42] In contrast, the record here shows that forcing a woman who would otherwise obtain a D&X abortion from Dr. Carhart to obtain another form of abortion *would* pose appreciable health risks. *See supra* at 11.

by the Act. The State contends that the Act serves its interests in: (1) showing concern for the life of the unborn, "and more specifically for the partially-born"; (2) "preventing cruelty to partially-born children and unacceptable disrespect for potential human life"; and (3) "preserving the integrity of the medical profession." Pet. Br. at 48 (internal quotations omitted). The first two interests are simply "moral" stances that the State cannot enforce at the expense of women's constitutional rights. This Court has recognized that the decision to terminate or continue a pregnancy is one about which "men and women of good conscience can disagree." *Casey*, 505 U.S. at 850. Because the intensely personal decision implicates a protected liberty, this Court has explicitly held that the states "may not compel or enforce one view or the other." *Id.* at 851. Thus, this Court has rejected the suggestion that moral disapproval of abortion is a legitimate basis for restricting the procedure. *See also Hope*, 195 F.3d at 881 (Posner, C.J., dissenting) ("if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue"). Further, if moral stances such as those asserted by the State could serve as legitimate bases for an abortion restriction, they would justify complete abortion bans, in violation of *Roe* and its progeny.[43] Indeed, the State suggests that these two interests support a ban on a broader range of abortions. *See* Pet. Br. at 49 n.31. Finally, the State's last asserted interest in the integrity of the medical profession is undermined, not served, by the Act's usurpation of the physician's medical judgment, its criminalization of

[43] The Seventh Circuit's upholding of abortion restrictions that served only "moral . . . considerations" therefore clearly violates this Court's abortion jurisprudence. *See Hope*, 195 F.3d at 875.

safe, medically accepted surgical techniques, and its thwarting of future medical progress.[44]

Since the Act fails to "further[] the interest in potential life or some other valid state interest," and thus gratuitously threatens women's health and bodily integrity, it is unconstitutional under *Casey*. *Id.*, 505 U.S. at 878 (regulations "designed to persuade [the woman] to choose childbirth over abortion . . . [or] to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden"). *See Hodgson v. Minnesota*, 497 U.S. 417, 436 (1990) (citations omitted) (opinion of Stevens, J., joined by Brennan, J.) ("Under any analysis, the [parental notice for abortion] statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests."); *id.* at 459 (O'Connor, J., concurring in part and concurring in the judgment in part) (same); *Danforth*, 428 U.S. at 71 (spousal consent for abortion, even if constitutionally permissible, was unlikely to further the state's asserted interest).

Even accepting *arguendo*, and in spite of the contradictory case law, the State's position that the Act is constitutional so long as it does not cause a significant threat to a woman seeking an abortion, the State's argument still fails. The district court here correctly found that banning the D&X procedure would subject Dr. Carhart's patients who currently undergo D&X procedures to appreciably greater *and* unnecessary risks to life and health. S.A. 64. Accordingly, the Act is unconstitutional even under the State's proposed standard.

[44] The State cites, in support of its claim that this interest is served, a passage of testimony from Dr. Boehm, J.A. 640, describing his concededly personal beliefs, *see* J.A. 672-75, about what types of abortion are "moral." Dr. Boehm's views simply express, in different language, the same "moral" interests that the State terms concern and respect for the unborn.

The State attacks at great length the district court's conclusion that a ban on the D&X procedure would place a substantial risk on a number of Respondent's patients. The State argues that the district court's findings of fact should be ignored as "incredible."[45] Pet. Br. at 38. Of course, a district court's factual findings facts must be upheld unless clearly erroneous. Fed. R. Civ. P. 52(a); *Concrete Pipe and Prods. of California v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622-23 (1993); *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991). Here, the district court found that Dr. Carhart's use of the D&X procedure is "appreciably safer than the D&E procedure," S.A. 62, for several reasons, *see supra* at 11, each of which finds ample support in the record. S.A. 62-64. Those factual findings accord with other district courts' findings that D&X is the safest abortion method for some women. *See Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1068-71 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert denied*, 523 U.S. 1036 (1998); *A Choice for Women*, 54 F. Supp. 2d at 1152-54; *see also Doyle*, 162 F.3d at 468 ("the balance of evidence on the issue of health [is] decisively inclined in favor of the plaintiffs"); *Verniero*, 41 F. Supp. 2d at 484-85.

The State asserts that the evidence does not show that the D&X procedure is safer, only that it has the potential to be safer. *See* Pet. Br. at 44-45. The district court, however, properly relied on expert testimony regarding the reasons that the D&X procedure may be safer and on the testimony from Dr. Carhart describing his use of the procedure, which confirmed that the D&X procedure is, in fact, safer for some women. *Id.*

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[45] The State also claimed that "only a handful of physicians in the entire country use the procedure even occasionally." Pet. Br. at 38. However, there is no evidence in the record supporting this claim, nor is there any evidence in the record about the prevalence of D&X in the United States.

The State also attacks the district court's factual conclusions by arguing that: there are no medical studies or articles demonstrating the safety of the D&X procedure; it is incorrect to base any conclusions about the safety of D&X on knowledge gained by doing D&Es; and D&X is not taught in medical schools. Pet. Br. at 38-39, 41 n.27. These arguments demonstrate only that the D&X variant is new, not that it is unsafe. A surgical procedure can obviously be new but not unsafe. J.A. 311-12 (Stubblefield), 675-76 (Boehm). Moreover, this criticism of the district court's findings improperly seeks to shift the burden of proof in abortion litigation. Under this Court's precedents, the State has the burden of proof in establishing that the Act actually promotes women's health; it may not satisfy this burden by asserting that there is no evidence that it won't. *See supra* at n.40.

The State also attacks the district court's decision to credit the testimony of Respondent's witnesses and discredit portions of the testimony of the State's expert witnesses. The credibility of witnesses is a question uniquely within the province of the district court, Fed. R. Civ. P. 52(a); *Hernandez v. New York*, 500 U.S. 352, 364 (1991); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985), and the State has given no persuasive reason to disturb the district court's credibility findings.[46]

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[46] First, the district court credited the testimony of Respondent's expert witnesses, both abortion providers, because of their extensive experience in performing abortions. The district court properly discredited the testimony of one of the State's experts, Dr. Riegel, because he does not perform any abortion procedures whatsoever. S.A. 45. *See Planned Parenthood v. Ashcroft*, 655 F.2d 848, 857 n.12 (8th Cir. 1981), *rev'd in part on other grounds*, 462 U.S. 476 (1983).

The district court also properly *discredited* Dr. Frank Boehm's testimony that D&X is not safer than other procedures. S.A. 41-42, 62-63. Dr. Boehm based his opinion on the lack of any studies on the topic, *see* S.A. 41, yet later undermined his position by testifying that he and other physicians considered newly developed abortion procedures safe and integrated them into their practices prior to any studies on their safety.

Lastly, the State argues that the district court should have deferred to the Nebraska Legislature's determination of the safety of the D&X procedure. But this Court does not defer to legislative determinations that affect the exercise of constitutional rights, for to do so would eliminate all judicial protection for these rights. *See, e.g., Danforth*, 428 U.S. at 76-79 (assessing safety of saline amniocentesis); *Akron*, 462 U.S. at 437 (assessing safety of D&E outpatient procedure). Indeed, this is precisely the error made by the Seventh Circuit in *Hope*, which reviewed similar legislation under what amounts to less than even rational basis review. *Hope*, 195 F.3d at 874-75.

2. The Act's Purpose is Illegitimate.

The Nebraska Legislature enacted the Act with the impermissible purpose of narrowing the right to abortion recognized by this Court in *Roe* and *Casey*. This unconstitutional purpose is demonstrated by: (1) the posture taken by the State in defense of the Act; (2) the abortion restrictions already in place in Nebraska; (3) the statements of the Act's sponsors; and (4) the lack of even a rational relationship between the Act and the State's legitimate purposes. Each of those factors supports the conclusion that

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S.A. 43; J.A. 669, 675-76. Dr. Boehm's opinion was also undermined by: Dr. Stubblefield's testimony, which the district court found "particularly persuasive," S.A. 45; Dr. Boehm's ability to assess without any studies the safety of variations on the D&E procedure (J.A. 652-53); Dr. Boehm's relative inexperience with the D&E procedure (J.A. 627, 654-55, 692, 709); Dr. Boehm's admission that he is not in touch with current D&E procedures (J.A. 654-55); and the testimony of Dr. Carhart, who has successfully performed the procedure.

The State also argues that Respondent's witnesses were biased because of their views on abortion and because of their ties to the case. Pet. Br. at 37-38, 40-41. Conversely, the State argues that one of its witnesses, Dr. Boehm, had no reason to be biased. The district court was aware of these sources of potential bias or the lack thereof. Nothing in the record indicates that the district court did not properly take these factors into consideration in assessing the credibility of the witnesses.

"the Legislature's predominant motive . . . was to create a 'substantial obstacle' to abortion." *Mazurek v. Armstrong*, 520 U.S. 968, 974 n.2 (1997) (internal quotations omitted).

First, the State's improper purpose is demonstrated by the position the State has taken in defense of the Act. *See Jane L. v. Bangerter*, 102 F.3d 1112, 1117 (10th Cir. 1996) (state's improper purpose was "confirmed by the State's briefs on appeal, in which the State in essence concedes that the section was intended to prevent [certain abortions]. . ."). *See also Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (state's concessions regarding purpose were properly relied upon by district court in finding improper purpose). Most tellingly, in petitioning for certiorari, the State asked this Court not simply to uphold the Act, but to use consideration of the Act as an opportunity to overturn all of the Court's prior abortion jurisprudence and hold that abortion is not constitutionally protected. Pet. for Cert. at 16-18. This is clear evidence that the Act's purpose was not to serve a legitimate state interest, but "to provide a vehicle by which to challenge *Roe v. Wade*." *Jane L.*, 102 F.3d at 1116.

The State has not argued that the Act can be reconciled with this Court's abortion jurisprudence, which permits only insubstantial burdens on the abortion decision prior to viability, and then only when those burdens legitimately further the interests in maternal health or potential life. *Casey*, 505 U.S. at 876-77. Instead, the State attempts to discard that entire framework and replace it with one in which a fetus is accorded legal protection, regardless of viability, once a physician begins removing the fetus from the woman's uterus. *See, e.g.*, Pets.' Br. at 10-11, 29-30, 33-34. The State's repeated attempts to curtail the protections of *Roe* and *Casey* in the course of defending the Act demonstrate its true and impermissible purpose -- to place a substantial obstacle in the path of women seeking abortions.

Second, the Act's purpose is demonstrated by Nebraska's pre-existing statutory framework. *See Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 464, 469-71 & n.6 (1981) (examining statutory framework for evidence of law's intent). Prior to passage of the Act, Nebraska already limited the performance of abortions to physicians licensed in the State. Neb. Rev. Stat. § 28-335 (enacted 1977). Nebraska's scheme for physician licensing includes means of investigating physicians and revoking physician licenses for such offenses as unprofessional conduct or a pattern of negligent conduct. Neb. Rev. Stat. §§ 71-168(1); 71-147(10); 71-148. Moreover, physicians licensed by the State of Nebraska are "recognized by the State as capable of exercising acceptable clinical judgment." *Doe v. Bolton*, 410 U.S. at 199. Thus, prior to passage of the Act, Nebraska already had legal mechanisms for ensuring that abortions are performed by doctors capable of deciding which procedures are medically appropriate for their patients. In addition, Nebraska already prohibited post-viability abortions except to save the life or health of the woman, and required that any post-viability abortions legally performed utilize the abortion method most likely to preserve the life of the fetus. Neb. Rev. Stat. §§ 28-329, 28-330. Finally, prior to passage of the Act, Nebraska already required that women seeking abortions receive a range of information about their pregnancies, the nature and risks of abortion procedures, and alternatives to abortion at least twenty-four hours prior to consenting to an abortion procedure. Neb. Rev. Stat. §§ 28-327, 327.01 (1995 & Supp. 1996). Accordingly, the State had already implemented measures to inform the woman's decision and dissuade her from undergoing an abortion. In light of this statutory scheme, the Act is either entirely superfluous or aims to criminalize abortions that are constitutionally protected under this Court's abortion jurisprudence. *See Hope Clinic v. Ryan*, 995 F. Supp. 847, 860 (N.D. Ill. 1998) (statute was either superfluous or intended to ban safe, pre-viability abortion procedures),

rev'd, 195 F.3d 857 (7th Cir. 1999); *see also Alaska*, slip op. at 11 ("Having passed the Act with knowledge of the legal defects, it seems more likely than not that the unstated purpose of the Act was to cloud the scope of abortion procedures, i.e., to restrict abortion in general.").

Additionally, the explicit statements of the Act's sponsors demonstrate that the purpose of the Act was to chill the performance of safe, commonly used abortion methods without regard to fetal viability. *See Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (relying on statements made by law's sponsor to determine law's purpose). As described above, the bill's primary sponsor, Senator Maurstad, knew that the Act bans more procedures than just D&X. More specifically, he recognized that the Act encompasses abortions even where: (1) the procedure is performed during the first trimester of pregnancy; (2) the fetus is removed in a head-first position; (3) fetal demise is caused by dismemberment rather than compressing the cranium; and (4) fetal demise is caused after virtually any part of the fetus has been brought into the vagina. *See supra* at 4-6. Nonetheless, Senator Maurstad instructed other legislators that the Act should not be changed to include a definition that would have limited the Act's reach to avoid these consequences. *See supra* at 5. These statements show that the intent of the Act's sponsors was to ban, or at least chill, the performance of a range of common abortion methods without regard to fetal viability.

Finally, the Court may infer an impermissible purpose because, as already described, *see supra* at 35-42, the Act is not even rationally related to advancing either of the legitimate state interests that may justify restrictions on abortion: maternal health or potential life. *See Washington v. Davis*, 426 U.S. 229, 241-42 (1976) (examining the impact of official action to ascertain its purpose). The failure of the

Act to serve either of the recognized, legitimate state interests which may undergird abortion restrictions is powerful evidence that its actual purpose is the impermissible one of thwarting access to safe abortions. *See Hope*, 195 F.3d at 882 (Posner, C.J., dissenting) ("Here the intent is to block a woman from seeking an abortion when her doctor advises her that the best procedure for her is criminal."). As the Eighth Circuit held recently, "Where a requirement serves no purpose other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right." *Planned Parenthood v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997) (citation omitted). Indeed, the Nebraska legislature's willingness to jeopardize, rather than protect, maternal health is simply further evidence that the Act is "an unreasonable or arbitrary regulation designed to inhibit . . . the vast majority of abortions." *Danforth*, 428 U.S. at 79.

C. Even if Narrowed, the Act is Unconstitutional Because it Lacks an Adequate Exception for Sick or Dying Women.

Abortion restrictions must contain adequate provisions to preserve a woman's life *and* health, even post-viability. *Casey*, 505 U.S. at 879-80; *Thornburgh*, 476 U.S. at 768-69; *Jane L.*, 61 F.3d at 1503-04. An adequate life and health provision must cover not only situations where the woman is facing physical harm but also "situations where a woman is faced with the risk of severe psychological or emotional injury which may be irreversible." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 210 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). *See also Casey*, 505 U.S. at 882 ("It cannot be questioned that psychological well-being is a facet of health."); *Bolton*, 410 U.S. at 192.

The Act lacks adequate health and life exceptions and is thus invalid. For example, under the Act, the parents of a young teenager who is suicidal because she is pregnant as a

result of forcible rape cannot, in assisting her "to exercise [her] rights wisely," *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) (opinion of Stevens, J., joined by O'Connor, J.), consent to a D&X abortion for her even if both they and her physician believe it is the safest method. And, under the Act, a woman who is sick, but not dying, from a pregnancy is compelled to use an abortion method that is not the safest for her. *See generally Jane L.*, 61 F.3d at 1502-05.

The State argues that requiring a health exception would prevent states from regulating abortion at all. This is simply incorrect.[47] States may regulate abortion but must always include adequate health and life exceptions. *Casey*, 505 U.S. at 879. This Court has never permitted a State to substitute its judgment for the physician's about when a woman's health is compromised.

Unsurprisingly, then, federal courts reviewing partial-birth abortion bans have found their lack of any health exception is an independent reason to find them unconstitutional. *See, e.g., Woods*, 982 F. Supp. at 1378; *Verniero*, 41 F. Supp. 2d at 501-503; *Butterworth*, 54 F. Supp. 2d at 1156-57. The one court that has departed from this principle misapprehends *Casey*'s requirement that any abortion regulation must give the physician room to protect the health of *each* of his or her patients. *See Hope*, 195 F.3d at 873.

The Act's cramped "life" exception also renders the Act unconstitutional, because it does not permit a partial-birth

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[47] For example, this Court has permitted the States: to require parental consent or notice for minors seeking abortions so long as an adequate judicial bypass mechanism is also provided, *see Casey*, 505 U.S. at 899; to limit the performance of second-trimester abortions to ambulatory surgical centers, *see Simopoulos v. Virginia*, 462 U.S. 506 (1983); and to require that adult women be given state-scripted information designed to dissuade them from having an abortion, and that women be required to wait 24 hours to deliberate on that information. *See Casey*, 505 U.S. at 881-87.

abortion when a pregnant woman's life is threatened by mental illness.[48] *See Voinovich*, 130 F.3d at 209. By enumerating certain life-threatening conditions -- a physical disorder, physical illness, or physical injury -- the legislature must have intended to exclude others, such as mental illness. *See, e.g., Nebraska City Educ. Ass'n v. School Dist. of Nebraska City*, 267 N.W.2d 530, 532 (Neb. 1978). The exclusion of mental illness is impermissible. *See supra* at 46.

Perhaps recognizing these shortcomings, the State argues that life and health exceptions are not necessary because the Act regulates only the *method* of abortion. Pet. Br. at 30. But this Court rejected precisely this argument in *Thornburgh*. 476 U.S. at 768. The State's position is untenable because the Constitution protects the bodily integrity of a woman seeking an abortion and does not require a woman to risk her health and life at the state's whim or even to benefit the fetus. *See supra* at 29-34. Accordingly, the Act's lack of a health exception and an adequate life exception renders it unconstitutional. The judgment of the court of appeals should be affirmed on this ground as well.

III. THE ACT IS VOID FOR VAGUENESS.

The Act is impermissibly vague, chiefly because its constituent term "substantial portion" has no core meaning

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[48] Even when the Act's limited exception applies, a physician's good-faith determination that the procedure is necessary to save the woman's life from a life-endangering physical condition, illness, or injury does not preclude a jury from later second-guessing that conclusion. This will chill physicians from providing life-saving care for fear of the Act's daunting criminal penalties and thus also renders the Act's exception constitutionally defective. *See Verniero*, 41 F. Supp. 2d at 503 (finding unconstitutional similar exception in part because it "does not protect the physician's ability to make a judgment call as required by *Roe*").

and therefore leaves physicians to guess at what conduct the Act actually prohibits.[49]

Criminal statutes must give adequate notice of the conduct they prohibit. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law must give the persons targeted by the law "a reasonable opportunity to know what is prohibited so that [they] may act accordingly." *Grayned*, 408 U.S. at 108. Moreover, where a law threatens to inhibit the exercise of constitutional rights, as does the Act, greater scrutiny for possible vagueness is warranted. *Colautti v. Franklin*, 439 U.S. 379, 391 (1979). The Act fails these requirements.[50]

The district court held that the term "substantial portion" in the Act was void for vagueness. S.A. at 86-87. This conclusion is fully supported by the numerous and conflicting explanations of the term in the Act's legislative history, and it dooms the Act as a whole. Unless physicians are given clear guidance about how much of a fetus can legally be removed from the woman's uterus before triggering the Act, they will be unable to conform their conduct to the Act. Moreover, the numerous definitions of "substantial portion" that appear in the record are fodder for

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[49] The term "living" is also vague in the context of a pre-viability abortion. In every such abortion, fetal demise is inevitable, yet the fetus may continue to have a heartbeat, living tissue or living cells throughout the procedure. *See, e.g.*, J.A. 258, 260, 268 (Stubblefield); J.A. 151 (Hodgson). The Act does not give physicians notice of which criteria determine whether the fetus is "living." *See* S.A. 86 n.47.

[50] The State's proposed revision of the Act to limit it to certain abortions the State calls "D&X" is equally vague. *See Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 622 (1976) (limiting construction of ordinance by state supreme court itself found vague). It departs radically from the Act's text and leaves physicians to guess, at peril of lengthy imprisonment, exactly which abortions are prohibited. For example, the State's gloss requiring a "separate death-causing procedure" compounds the Act's vagueness. How is a physician to know which conduct constitutes a "separate procedure," as opposed to a step within a procedure? The State provides no guidance, and the Act is silent.

arbitrary and discriminatory enforcement of the Act. The inevitable effect of this vague term will be, therefore, to cause Dr. Carhart and other Nebraska physicians to "steer well clear of the forbidden zone." *Hope*, 195 F.3d at 889 (Posner, C.J., dissenting).

Based on this evidence, the district court properly held that "the words 'substantial portion' are so vague as to be meaningless to doctors, lay people and prosecutors alike," and that, therefore, the Act is "the epitome" of a vague statute. S.A. 87. This Court should affirm the decision below on this basis as well.

CONCLUSION

For all the foregoing reasons, and in order to guarantee that the women of Nebraska and the United States continue to have access to the safest abortions and are not subject to invidious efforts to interfere with their right to privacy, the judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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